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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/873,699	06/04/2001	Wesley Johnson	2102	4961

28078 7590 02/23/2006

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SUITE 3250  
INDIANAPOLIS, IN 46204

EXAMINER

BROWN, MICHAEL A

ART UNIT PAPER NUMBER

3764

DATE MAILED: 02/23/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/873,699

Applicant(s)

JOHNSON ET AL.

Examiner

Michael Brown

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 28 September 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5 and 45-69 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 45-69 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>8-5-04, 2-24-05</u> . | 6) <input checked="" type="checkbox"/> Other: <u>IDS: 1-27-05</u> .                     |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 3-4, 45, 51-52, 54-55, 63, 65-66 are rejected under 35 U.S.C. 102(e) as being anticipated by Mirza.

Mirza discloses in figures 1-10 a method of creating a transverse cavity in a bone comprising the steps of inserting a tool having a tool body 12, into a bone, through an opening 42, in the bone, defining a body insertion area (the opening in 42), activating a blade 14, pivotably mounted in and located in the tool body (the hinge portion of 20 is located inside of 18 of the tool body 12), to swing through an arch (fig. 10), the transverse cavity 44, having an area large than the tool body insertion area (44 is larger than 42), the blade includes a cutting surface (edge of 14 that cuts the bone), the transverse cavity is symmetric about a plane defined by a long axis of the blade (fig. 9), initial position and a line normal to the transverse plane to be created, the blade is mounted on the tool body for rotational motion about a pivot 22, the surface of the bone is identified (as recited in claim 51) in order to form a cut in the correct position on the bone.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2, 5, 53, 58-62 and 64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mirza in view of Johnson.

Mirza discloses in figures 1-27 a method of creating a transverse cavity in a bone, wherein the bone includes a vertebral fracture (col. 3, lines 5-15), that can include an endplate surface of the vertebral (a portion of the spine), the tool could be inserted through a pedicle of the vertebral along a surgical entry point (fig. 25), the entry point could be selected from the transpedicular approach (fig. 25). However, Miraz doesn't disclose the blade being blunt. Johnson teaches in col. 2, lines 29-31 a cutting blade that is blunt. It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the blade disclosed by Mirza could be blunt as taught by Johnson in order to prevent excess cutting in the transverse cavity. One of ordinary skill in the art would know that the transverse cavity could be oval shaped or asymmetric about a vertical axis though the bone. It would depend on the desired shape that the medical attendant wants to form in the body.

Claims 46, 56 and 67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mirza in view of Nallakrishnan.

Mirza discloses in figures 1-27 a method of creating a transverse cavity in a bone, substantially as claimed, as set forth above. However, Mirza doesn't disclose the blade being activated by a push-pull action. Nallakrishnan teaches in figures a cutting blade 15, that is activated by a pushing and pulling action (the pushing and pulling of knob 20 and pin 31 inside of track 28). It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the device disclosed by Mirza could be activated by push-pull motion as taught by Nallakrishnam in order to move the blade out of the tool body and into position to cut the transverse cavity in a bone.

Claims 47-50, 57 and 68-69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mirza in view of Middeman.

Mirza discloses in figures 1-27 a method of forming a transverse cavity in bone, substantially as claimed. However, Mirza doesn't disclose a blade defined by two flexible members mounted at a hinge so the flexible members swing outwardly upon activation. Middleman teaches in figures 1-7C a blade defined by two flexible members (150, 151) mounted at a hinge so the flexible members swing outwardly upon activation. It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the blade disclose by Mirza could be fabricated as two independently flexible pivotally mounted elements as taught by Middleman in order to be able to cut the bone form both side of the tool body.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-5 and 45-69 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Scholten discloses a method of forming a transverse cavity in a bone.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

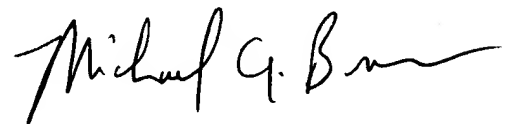
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gergory Huson can be reached on 571-272-4887. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

M. Brown  
February 20, 2006

A handwritten signature in black ink, appearing to read "Michael A. Brown". The signature is fluid and cursive, with a long horizontal stroke at the end.

MICHAEL A. BROWN  
PRIMARY EXAMINER